

REG. v. KHOO JOO TIANG.

[App. Crim. Juris. (Spenser Wilkinson, J.)
October 18, 1952]

[Penang — Criminal Appeal No. 35 of 1952]

Revenue — Entertainments Duty Proclamation — Prosecution under s. 5 — Whether excessive payment for drinks and food in a cafe providing entertainment is a payment of a lump sum or a payment for a ticket within the meaning of s. 7.

This was a prosecution under section 5 of the Entertainments Duty Proclamation. The defendant is the proprietor of a cafe providing music and vocal recitators inside an amusement park in Penang. Melon seeds were automatically served on customers who were charged with an exorbitant price for them by means of a printed form of bill which apparently contemplated such a charge to every customer, and the charge paid for coffee was also excessive. The prosecution alleged that part of the price paid for the coffee and melon seeds must represent the price of a seat for the entertainment.

Held: (1) following the *Trocadero* case⁽¹⁾, payment (whether excessive or otherwise) for melon seeds is not a payment in a lump sum or a payment for a ticket within the meaning of section 7 of the Proclamation; (2) in a prosecution, the strict law of proof in criminal proceedings must be applied. It cannot be inferred that the excessive charge for coffee and melon seeds must represent or include a charge for admission to this cafe.

Sections 3, 5 and 7 of the Proclamation distinguished.

Cases referred to:—

- (1) *Trocadero case* (1919) 1 K.B. 11.
- (2) *Palace Pier case* (1920) 1 K.B. 104.
- (3) *Casino case* (1937) 3 All E.R. 858.
- (4) *Attorney-General v. McLeod* (1918) 1 K.B. 13.
- (5) *Attorney-General v. Valentia* 41 T.L.R. 78.
- (6) *Attorney-General v. Swan* (1922) 1 K.B. 682.
- (7) *Attorney-General v. Arts Theatre Ltd.* (1933) 1 K.B. 439.

MAGISTRATE'S APPEAL.

C. M. Sheridan (Federal Counsel) for the Crown.
F. G. Pooley for the respondent.

The facts appear sufficiently from the judgment.

Spenser Wilkinson, J. : — This was an appeal by the Crown against the order by the Magistrate's Court acquitting the Proprietor of the New Amusement Cafe at the Great World Park of two charges of admitting persons to his Cafe on payment for admission without complying with the provisions of the Entertainments Duty Proclamation. The case was heard by the President of the Sessions Court, sitting as a First Class Magistrate.

At the conclusion of the arguments I dismissed the appeal and intimated that I would give my full

reasons in writing, if asked to do so by the parties, and I have now been asked to do so.

The appeal was argued before me on the basis that the Entertainments Duty Proclamation was substantially the same as the equivalent English provisions which are contained in the first two sections of the Finance (New Duties) Act, 1916. Mr. Pooley for the respondent stated that apart from a few minor changes of wording there was no substantial difference between the two sets of provisions and upon a casual glance this appeared to be so. When I came to write this judgment, however, I discovered that there was a difference in the wording between our section 5 and the equivalent English provision. This difference, which appears to me to be substantial and material, does not affect the result of the appeal, and indeed confirms it; and for this reason I have not considered it necessary to call for further argument. I think it will be well, however, for me to deal fully with this point after giving the reasons why I dismissed the appeal on the arguments put forward.

The facts are set out in the grounds of decision of the learned President as follows:—

"Admission to the Great World Park is obtained by paying 20 cents at the gate. Upon this 20 cents admission fee entertainment tax is levied and has been regularly paid. The "entertainment" for which the tax is paid appears to be seeing the bright lights, watching other people enjoying themselves on swings and roundabouts and listening to the music of the band in the open air cafe which is amplified by loudspeakers so that all may hear.

"The cafe where the band plays is the scene of the alleged offences, the subject of the charges. The cafe is of the type common in these parks. It is in the open air separated from the general grounds by a low fence over which anyone outside can easily look. It was admitted that the music could be as easily heard outside as inside. Admission to the cafe is normally obtained by an entrance facing the stage. There are also two subsidiary entrances and exits, one at each side of the stage. As one enters one is not checked in any way. Inside is a typical cafe with tables. The tables have chairs arranged at three sides only so that all face the stage.

"On the night in question two clerks from the Controller of Entertainments Tax's Office went to the cafe as agents provocateurs (which was freely admitted). They sat down at a table and ordered two cups of coffee (for which the maximum controlled price is 18 cents per cup). The waitress brought their order and also two packets of melon seeds of a type which can normally be bought for five cents. The two clerks protested that they did not want the melon seeds but as a result of what the waitress said they accepted them. (I did not allow what the waitress said to be recorded as evidence because she was not on trial and the failure of the prosecution to call her as a prosecution witness was not explained). The clerks were left with the impression that the purchase of the melon seeds was customary for all patrons of the cafe. The clerks paid their bill shortly after getting their order. It was for \$1.60 (Ex. P. 3). While the clerks partook of their coffee and melon seeds the band played various tunes and a series of singers went up to the microphone and sang.

"The form of the bill is of importance since it shows *prima facie* that the management presupposes that all patrons will buy melon seeds with their orders. In this

particular order the cost of melon seeds was apparently 52 cents per packet.

"As the clerks left the park they met the Manager, whom they knew well from their official duties, exchanged pleasantries with him but made no complaint about their bill or their being obliged to purchase melon seeds against their will.

"From these facts the prosecution asked the Court to deduce that some 45 cents of the price paid for the coffee and melon seeds must represent the price of a seat to listen to the band."

The principal authorities cited were the *Trocadero case* (*Lyons v. Fox*⁽¹⁾); the *Palace Pier case* (*Cordiner v. Stockham*⁽²⁾); and the *Casino case* (*Attorney-General v. London Casino*⁽³⁾).

As pointed out by the learned President the facts in the *Palace Pier case*⁽²⁾ approximate somewhat to those in the present case. In that case there was a partially enclosed place on the pier where the band played and seats were provided both inside and outside the enclosure and the band could be heard well outside. But the important fact in that case—and the fact upon which Lord Reading clearly based his judgment—was that anyone who took a seat in the enclosed part had to pay 2d. for his seat. In his judgment Lord Reading says: "We are only concerned with the case of persons who pay their 2d. when taking a chair in the roofed structure where the band is playing". I think this clearly distinguishes that case from the present case.

In the *Trocadero case*⁽¹⁾ it was held by a majority in the Divisional Court that payment of a fixed price for tea or dinner at a restaurant where a concert was given during and after the meal was not a charge for admission within the meaning of the English Act. That case was decided upon the construction of the Act and it was held that the wording of the Act was such that it did not apply to this class of case. Until the decision of Finlay, J., in the *Casino case*⁽³⁾ the *Trocadero case*⁽¹⁾ had never been criticised or overruled, nor, in my humble opinion, were any of the cases decided between 1919 and 1937 in any way inconsistent with that construction of the Act.

For this reason the *Casino case*⁽³⁾ has caused me considerable difficulty. That was a case where a London theatre was converted for use as a restaurant and theatre combined. Finlay, J., in his judgment was at pains to point out that this was something which in England was entirely new, because in addition to the ordinary facilities for dining and dancing provided by many restaurants there was here also an elaborate and ambitious revue of a very high class. The facts of the case were, therefore, very special and differed from the facts in the *Trocadero case*⁽¹⁾. Nevertheless, I cannot escape the conclusion that the principle of the judgment in the *Casino case*⁽³⁾ follows the principles expressed in the dissenting judgments in

the *Trocadero case*⁽¹⁾. In his judgment Finlay, J., expresses the view that subsequent cases are inconsistent with certain dicta in the *Trocadero case*⁽¹⁾. It seems to me, however, that what he refers to as dicta form the very basis of the decision and, with the greatest respect, although I have studied the judgments in all the cases he mentions, I am unable to find in the later cases the inconsistency to which he refers.

In the face of this conflict of judicial opinion I prefer, in these proceedings, to follow the *Trocadero case*⁽¹⁾ for two reasons. In the first place I do not think it can possibly be said that a payment (whether excessive or otherwise) for water melon seeds is a lump sum within the meaning of section 7 of the Proclamation or a payment for a ticket within the meaning of sub-section (2) of section 7 which reads as follows:—

"7. (1) Where the payment for admission to an entertainment is made by means of a lump sum paid—

- (a) as a subscription or contribution to any club, association or society, or
- (b) for a season ticket or
- (c) for the right of admission to a series of entertainments or to any entertainment during a certain period of time,

the entertainments duty shall be paid on the amount of the lump sum.

(2) If the Collector is of opinion that the payment of a lump sum or any payment for a ticket includes payment for other privileges, rights or purposes besides the admission to an entertainment on covers admission to an entertainment during any period for which the duty has not been in operation, the duty shall be charged on such amount as appears to the Collector to represent the right of admission to entertainments in respect of which entertainments duty is payable."

These two sub-section of section 7 are together word for word the same as sub-section (4) of section 1 of the English Act except for the omission of the "but" at the beginning of the second sub-section. These are the provisions under which the English cases of *Attorney-General v. McLeod*⁽⁴⁾, *Attorney-General v. Valentia*⁽⁵⁾ and *Attorney-General v. Swan*⁽⁶⁾ and *Attorney-General v. Arts Theatre Ltd.*⁽⁷⁾ were decided. The first of these cases concerned admission to a concert after a Freemasons Dinner and the next two dealt with subscriptions to the Hurlingham Club and to the Essex County Cricket Club respectively, and the last dealt with a club which provided theatrical entertainments. Every one of these cases dealt with a lump sum paid as a subscription or contribution to an association or club within the meaning of section 7(1). (See for example per Roche, J., in *Attorney-General v. McLeod*⁽⁴⁾ at p. 21).

The Crown here seeks (as it did in the *Casino case*⁽³⁾) to split up the payment made in the manner provided by sub-section (2). But as I read the Proclamation that sub-section contemplates splitting up only lump sum payments made for a series of entertainments or payments for a ticket for which the

sum paid includes payment for something besides the entertainment. In my view none of the payments in the *Trocadero case*⁽¹⁾, the *Casino case*⁽³⁾ or the present case is of the kind in respect of which the Legislature has provided for splitting up. This to my mind strongly reinforces my view that the decision in the *Trocadero case*⁽¹⁾ was a correct decision on the construction of the Statute.

Another reason for following the *Trocadero case*⁽¹⁾ is because that case, like the case now before me, took the form of a prosecution. In a prosecution the strict law of proof in criminal proceedings is applicable, whereas in a claim by the Crown for payment of duty or for a declaration the onus of proof would be different and the result, therefore, might not be the same even in respect of similar issues. In considering the decided cases I think it is important to note which of those decisions determine what is in effect a pure taxation issue and which of them decide the question of the guilt or otherwise of a person accused of an offence. None of the English cases to which I refer in this judgment were decided in respect of prosecutions except the *Trocadero case*⁽¹⁾ and the *Palace Pier case*⁽²⁾, which was a clear case of admission on payment.

I would, therefore, be prepared, if necessary, to hold that the provisions of the Proclamation were, to use the words of A. T. Lawrence, J., only "aimed at cases where people pay for admission to an entertainment in the ordinary way" and were not intended to apply to this class of cases. It is not necessary, however, for me to go as far as this because, even if the law is as laid down in the *Casino case*⁽³⁾, I think the prosecution failed on the evidence to prove sufficient facts to establish a payment for admission.

It was argued for the Crown that the bare facts proved were sufficient to constitute the offence—that the fact that water melon seeds were automatically served to the two witnesses, who were charged for them at an exorbitant price by means of a printed form of bill which apparently contemplated such a charge to everyone was sufficient to show that this charge must represent or include a charge for admission to the cafe. I think this argument carries inference too far in a criminal prosecution. Evidence could have been called to show whether or not all persons entering the Cafe were bound to purchase water melon seeds, but no such evidence was tendered. Moreover, the defendant, through his Solicitors, had stated quite positively in a letter written before these proceedings ever started that anyone was free to enter the Cafe without charge and that the purchase of water melon seeds was not obligatory on customers. In these circumstances I do not see how it can be said that the learned President

was wrong in deciding that the case had not been sufficiently proved. I think he was right in pointing out that the circumstances proved might show profiteering in water melon seeds or might indicate a charge for admission and until there was sufficient evidence to be sure which of these possible inferences was the correct one there could be no conviction.

It was for these reasons that I dismissed the appeal. I come now to the particular wording of the Entertainments Duty Proclamation. There are three sections which are of particular importance in regard to this case. Section 3 is the principal charging section and states that there shall be charged a duty on all "payments for admission" to any entertainment. Then there is section 7, which I have already dealt with. Then I come to section 5, which is the penalty clause under which the respondent in this case was charged and reads as follows:—

"If any person is admitted on payment to any entertainment and the provisions of this Proclamation are not complied with, the person admitted and the proprietor of the entertainment to which he is admitted shall be liable on conviction in respect of each offence to a fine, in the case of the person admitted not exceeding fifty dollars and in the case of the proprietor not exceeding five hundred dollars, and the proprietor shall in addition be liable to pay any duty which should have been paid."

There appears to me to be the clearest possible difference between the phrase "admitted on payment" used in section 5 and the phrase "a payment for admission" used in sections 3 and 7; under the latter phrase payment might be made before, at or after an entertainment, so long as it is referable to admission. "Is admitted on payment", however, seems to me to contemplate a payment made contemporaneously with the admission. I can see no difference between "admitted on payment" and "admitted upon payment", and I think there can be no doubt that the latter phrase would mean payment at the time of admission. If I am right in so contruing our Proclamation it follows that although a proprietor of an entertainment may be chargeable with tax under section 3 he will not be liable to prosecution under section 5 unless he has admitted somebody "on payment".

I am bound to presume that the difference of wording in the different sections of our Proclamation is deliberate. Moreover, there seems to me to be a sound practical reason for the use of this wording. Under section 5 not only the proprietor but also the person paying is liable to a fine if the duty is not paid. If a person is admitted "on" payment to an entertainment there is some reason why he should know that he ought to be paying entertainments duty as part of the fee for admission and if he does not so pay he is liable to prosecution. It seems to me, however, to be going rather far to suggest that in the lump sum cases

a member of the public can be expected to know either whether entertainments duty is payable in respect of part of that lump sum or how much of the lump sum, if any, is chargeable with duty.

As I read the Proclamation, therefore, duty may be chargeable upon lump sum payments in certain circumstances and the Crown no doubt has various remedies for recovering the duty where it is payable, but when it comes to a prosecution under section 5 this can only succeed where there has been a failure to pay duty in respect of somebody admitted on payment. I think it would be unduly stretching the meaning of words to describe the transaction proved in this case as an admission on payment. On the evidence it is not clear how long after payment the witnesses left the Cafe, but if they paid just before they left, as many people probably do, the transaction might well be described as a "departure on payment".

I do not think there is any difference in effect between a "payment on admission" which is defined by the Proclamation and an "admission on payment", so that there can, of course, be successive dutiable payments in respect of different parts of a place of entertainment, but in each case, in order to come within section 5, the admission must be an admission on payment.

Appeal dismissed.

TAN PHEE TECK v. TAN TIANG HEE.

[Court of Appeal (Mathew, C.J. (F.M.), Storr and Knight, JJ.) June 6, 1952]

[Singapore—Civil Appeal No. 13 of 1951]

Will—Construction—Chinese custom—Adoption by father of a child to be a son to his son.

This is an appeal on a point of interpretation of the Will of a Testator named Tan Kim Chuan. The part of the Will in question reads "As to the remaining third thereof in trust for all the children (including those whom he may adopt) of my nephew Tan Kek Tiang." The appellant had been adopted by Tan Kek Tiang's father to be a son of Tan Kek Tiang. The question arises as to whether the words "whom he may adopt" mean children actually adopted by Tan Kek Tiang or whether their meaning can be stretched to include children adopted on his behalf by his father according to Chinese custom.

Held (per Mathew, C.J. (F.M.) and Storr, J.) on a true construction of the clause which is clear and unambiguous, and considering that the Will was drawn in the English language and was interpreted to the Testator before he executed it, the act of adoption must be made personally by Tan Kek Tiang.

Per Knight, J., (dissenting) that bearing in mind the stronger attachment to Chinese custom by a Chinese Testator at the time when the Will was executed, and the probability of a genuine mistake in interpretation, the Testator would have made his intention very clear if he had intended to exclude a child adopted in a perfectly valid manner in accordance with long-established Chinese custom.

COURT OF APPEAL.

Philip Hoalim for the appellant.

A. N. Mitra for the respondent.

Cur. Adv. Vult.

Mathew, C.J., (F.M.) :—This is an appeal from an order of the learned Chief Justice, Singapore, dismissing the applicant-appellant's claim to benefit under a will made by the testator Tan Kim Chuan on the 4th day of August, 1896.

The point in this appeal is a short one and concerns the interpretation which should be placed on the following passage in the Will :—

"As to the remaining third thereof in trust for all the children (including those whom he may adopt) of my nephew Tan Kek Tiang."

It is not seriously disputed by the respondent that the appellant is not the adopted son of Tan Kek Tiang, and indeed the Registrar has found that he was so. The Registrar's finding, in his certificate of the 26th May, 1951, is as follows :—

"I find it proved that the said Tan Phee Teck was adopted by Tan Kim Quan to be a son to Tan Kek Tiang deceased, the nephew of the abovenamed Tan Kim Chuan deceased."

The question for decision is whether the words "(including those whom he may adopt)" require that the adoption must be the personal act of Tan Kek Tiang, if the adopted child is to share under the will.

Counsel for the appellant has argued at some length that the testator must have intended that the adopted child of Tan Kek Tiang if adopted by Chinese custom should be entitled to share. He has pointed out with some force that if any other interpretation is put on this clause it has the effect of ousting well established Chinese custom. The whole purpose of a father adopting a child to be a son to his son is to avoid the possibility of the son's line dying out. As Tan Kek Tiang was in a poor state of health, and it did not appear likely that he would survive to an age when he personally could adopt a son by his own act, his father adopted a son (the present appellant) to be the son to Tan Kek Tiang.

I have considerable sympathy with the appellant, but I find myself unable to put a construction on the words "whom he (Tan Kek Tiang) may adopt" which will have the effect of altering the clear and unambiguous meaning of the words, which is that the act of adoption, if it is to be effective under the will, must be made personally by Tan Kek Tiang.

One can only assume that this particular form of words was used deliberately and that the testator understood their significance when the will drawn in the English language was translated to him in Hokkien before he signed it.